IN THE MISSOURI SUPREME COURT

---

CASE NO. SC92429

---

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA and
JACOBSMEYER-MAULDIN CONSTRUCTION COMPANY,
Plaintiffs

vs.

THE MANITOWOC COMPANY, INC.
Defendant/Third-Party Plaintiff/Appellant

vs.

UNITED STATES STEEL CORPORATION, as successor-in-interest to
LONESTAR TECHNOLOGIES, INC. a/k/a LONESTAR STEEL
Third-Party Defendant/Respondent

---

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
DIVISION 8, THE HONORABLE TOM W. DePRIEST, JR. AND
MISSOURI COURT OF APPEALS - EASTERN DISTRICT CASE NO. ED96780

---

# SUBSTITUTE BRIEF OF APPELLANT THE MANITOWOC COMPANY, INC.

---

MORROW WILLNAUER KLOSTERMAN
CHURCH, L.L.C.
James C. Morrow, #32658
M. Todd Moulder, #44181
Angela M. Witten, #60085
Executive Hills East, Building A
10401 Holmes, Suite 300
Kansas City, Missouri 64131-3405
Telephone: 816-382-1382
Fax: 816-382-1383

ATTORNEYS FOR THIRD-PARTY
PLAINTIFF/APPELLANT
THE MANITOWOC COMPANY, INC.

## TABLE OF CONTENTS

## TABLE OF CASES AND AUTHORITIES

**CASE LAW** **Page(s)**

**STATUTES & RULES** **Page(s)**

## JURISDICTIONAL STATEMENT

This appeal is from an Order/Judgment of dismissal with prejudice entered by Judge Tom W. DePriest, Jr. in the Circuit Court of St. Louis County, State of Missouri, on March 24, 2011. LF 62[1]. Appellant timely filed its notice of appeal on May 2, 2011. LF 98 – 102. This Court has jurisdiction pursuant to Article V, Section 10 of the Missouri Constitution, because this case was transferred on May 1, 2012, from the Court of Appeals by Order of this Court.

[1] References to the Legal File on appeal shall be designated as "LF__."

## STATEMENT OF FACTS

On November 4, 2009, Travelers Property Casualty Company of America and Jacobsmeyer-Mauldin Construction Company (hereinafter "Plaintiffs"), filed their Petition for Property Damage and to Enforce Settlement against Defendant/Third-Party Plaintiff/Appellant The Manitowoc Company, Inc. (hereinafter "Appellant"). LF 6. On January 8, 2010, Appellant filed its third-party petition, asserting claims for contribution and/or indemnity against Third-Party Defendant/Respondent, United States Steel Corporation (hereinafter "Respondent"). LF 6. On February 22, 2010, Plaintiffs' Motion for Leave to File First Amended Petition for Property Damage and to Enforce Settlement was granted, and Plaintiffs' First Amended Petition was filed. LF 7-25.

In Plaintiffs' First Amended Petition, Plaintiffs' alleged that "[o]n or about January 9, 2006, the boom on a 1998 Grove crane suddenly and unexpectedly fell down and landed on a building that was being constructed by BSI Constructors, Inc. (hereinafter referred to as "BSI") at Washington University in St. Louis County, Missouri." LF 8, ¶ 5. Plaintiffs further asserted that the boom fell because "the main hoist lift cylinder had split laterally in the housing area, which caused a loss of pressure." LF 8, ¶ 6. The crane and the building being constructed were damaged. LF 8.

On March 12, 2010, Appellant filed its Answer to Plaintiffs' First Amended Petition for Property Damage and to Enforce Settlement and Defendants' Third-Party Petition, stating a cause of action for contribution and/or indemnity against Respondent. LF 29-41. Appellant acknowledged that it was the manufacturer of the crane at issue in

the litigation. LF 36. Appellant also asserted that Respondent, through its predecessor Lonestar Steel, provided the steel and/or the steel cylinder for the crane at issue in Plaintiffs' First Amended Petition. LF 37. Further, Respondent provided the hydraulic cylinder and/or the material which forms the hydraulic cylinder. LF 37. Appellant's claims for contribution and/or indemnity are based upon Respondent supplying defective and inadequate raw materials and/or the defective and inadequate hydraulic cylinder. LF 39. This same hydraulic cylinder was the alleged cause of the crane collapse at issue in Plaintiffs' First Amended Petition. LF 37.

On July 27, 2010, Respondent filed its Motion to Dismiss the third-party petition, pursuant to Missouri Rule of Civil Procedure 55.27(6), providing for dismissal for failure to state a claim upon which relief can be granted. LF 45-48. Respondent cited to §507.080 and Rule 52.11(a) in support of dismissal, arguing that Respondent could not be liable for any sums paid in settlement. LF 46. Respondent relied exclusively on the fact that it was not a party to the settlement agreement, and therefore "cannot be liable for Plaintiff's breach of contract claims against Manitowoc or for any sums that Manitowoc voluntarily agreed to pay to Plaintiff." LF 46.

Appellant filed its Response to Respondent's Motion to Dismiss on August 4, 2010. LF 49-55. Appellant clearly set forth the liberal construction necessary under §507.080 and Rule 52.11(a), and demonstrated that the same allegations raised in Plaintiffs' First Amended Petition, i.e., the failure of the main hoist lift cylinder, formed the basis for the claim for contribution and/or indemnity. LF 51. Therefore, under a

reasonable construction of Respondent's authority, Appellant established that the claims were properly asserted in the third-party petition. LF 51-52.

The Motion to Dismiss was called and heard over seven months later, on March 18, 2011. LF 3. At the hearing on the Motion to Dismiss, Respondent requested leave to respond to Appellant's "new argument" that the claim for contribution and/or indemnity arose out of the property damage and, therefore, was properly asserted as a third-party petition. LF 3; see also LF 73. Respondent was granted leave to file its Reply by March 22, 2011, "at which time this matter will be submitted." LF 3. In Respondent's Reply in Support of its Motion to Dismiss Manitowoc Co.'s Third-Party Petition, filed on March 22, 2011, Respondent, for the very first time, argued that Appellant failed to meet the pleading requirements for contribution/indemnity. LF 58-59. Specifically, Respondent argued that Appellant was required to plead its own liability. LF 58-59.

On March 24, 2011, the Court granted Third-Party Defendant United States Steel's Motion to Dismiss Third-Party Plaintiff The Manitowoc Company, Inc.'s Third-Party Petition, and dismissed same *with prejudice*. LF 62. The Court did not state a basis for granting the Motion to Dismiss. LF 62.

Following dismissal, Appellant filed a Motion to Reconsider or, in the Alternative, to Modify Judgment and Suggestions in Support of same. LF 63-71. Appellant argued that dismissal was improper in that Appellant has a right to assert a claim for contribution and/or indemnity as a third-party action or, alternatively, through a separate suit. LF 66-69. Specifically, Appellant *again* set forth that the claim for contribution and/or

indemnity was based upon the exact same property damage asserted by Plaintiffs. LF 68. Alternatively, Appellant requested that at a minimum, the dismissal be modified to "without prejudice," because the "with prejudice" dismissal could be interpreted to take away all of Appellant's right to assert the contribution claim through a separate cause of action. LF 69.

On April 19, 2011, Respondent filed its Response and Suggestions in Opposition to Manitowoc's Motion to Reconsider or in the Alternative to Modify Judgment. LF 72-80. Respondent asserted that dismissal with prejudice was appropriate in that Appellant had not shown good cause to modify the order and that dismissal *with* prejudice was appropriate under Missouri law because Appellant "is precluded from 'otherwise asserting a claim for contribution'" in that Appellant had pled itself out of court by failing to assert its own liability. LF 78.

On April 20, 2011, a hearing was held on the Motion to Reconsider or, in the Alternative, to Modify Judgment, in front of the Honorable Tom W. DePriest, Jr. LF 2. At the hearing, the Court was confronted with the notion that the dismissal, if at all, should only be with regards to the present matter, and that Appellant should be permitted to assert the claims for contribution and/or indemnity through a separate cause of action. Although the hearing was not on the record, Judge DePriest indicated that he believed the dismissal was intended only to be with regard to the present case, i.e., stemming out of the settlement contract.

Because Appellant was not afforded an opportunity to respond to Respondent's claims regarding failure to plead its own fault, Appellant requested and was granted leave to file a Reply to address these arguments raised in Respondent's Response and Suggestions in Opposition. LF 2. Respondent sought and was granted leave to file a sur-reply. LF 2. Appellant filed its Reply in Support of Third-Party Plaintiff's Motion to Reconsider or, in the Alternative, to Modify Judgment on April 21, 2011. LF 81-87. Appellant clearly set forth that good cause was shown for modification of the judgment, and that, if required, Appellant had sufficiently pleaded its own fault. LF 82-85.

Respondent filed its Sur-Reply and Suggestions in Opposition on April 21, 2011. LF 88-96. Respondent stood on the assertion that Appellant failed to plead its own fault, and argued that Appellant was estopped from arguing that it did in fact plead fault. LF 92-94.

On April 22, 2011, the Circuit Court denied Appellant's Motion to Reconsider or, in the Alternative, to Modify Judgment. LF 97. Appellant timely filed the Notice of Appeal on May 2, 2011. LF 98-102.

## POINTS RELIED ON

I. **THE TRIAL COURT ERRED IN DISMISSING THE MANITOWOC COMPANY, INC.'S THIRD-PARTY PETITION BECAUSE IT STATED A CLAIM FOR CONTRIBUTION AND/OR INDEMNITY IN THAT THE MANITOWOC COMPANY, INC.'S CLAIMS SOUGHT CONTRIBUTION AND/OR INDEMNITY FOR ALL OR PART OF PLAINTIFFS' CLAIMS FOR PROPERTY DAMAGE AND TO ENFORCE SETTLEMENT AGREEMENT, AND IN THAT THE MANITOWOC COMPANY, INC. PROPERLY PLEADED THE CLAIM FOR CONTRIBUTION AND/OR INDEMNITY**

*State ex rel. Perkins Coie, LLP v. Messina*, 138 S.W.3d 815, 817 (Mo.App. 2004)

*Major v. Frontenac Industries, Inc.*, 899 S.W.2d 895 (Mo.App. 1995)

*State ex rel. Green v. Kimberlin*, 517 S.W.2d 124 (Mo.banc 1974)

*Hipp v. Kansas City Public Service Company*, 237 S.W.2d 928, 930 (Mo.App. 1951)

R.S.Mo. 507.080

Mo. R. Civ. P. 52.11

Mo. R. Civ. P. 55.10

## II. THE TRIAL COURT ERRED IN DISMISSING THE MANITOWOC COMPANY, INC.'S THIRD-PARTY PETITION WITH PREJUDICE BECAUSE THE APPROPRIATE DISPOSITION IS TO STRIKE THE THIRD-PARTY PETITION OR TO DISMISS WITHOUT PREJUDICE IN THAT "DISMISSAL" OF A THIRD-PARTY PETITION UNDER RULE 52.11 OR § 507.080 IS BASED UPON A LACK OF JURISDICTION AND, THEREFORE, IS NOT A DETERMINATION OF THE MERITS OF THE CASE

*State ex rel. Perkins Coie LLP v. Messina*, 138 S.W.3d 815 (Mo.App. 2004)

*Wedemeier v. Gregory*, 872 S.W.2d 625 (Mo.App. 1994)

*AAA Excavating, Inc. v. Francis Const., Inc.*, 678 S.W.2d 889 (Mo.App. 1984)

*State ex rel. Ashcroft v. Gibbar*, 575 S.W.2d 924 (Mo.App. 1978)

## ARGUMENT

**I. THE TRIAL COURT ERRED IN DISMISSING THE MANITOWOC COMPANY, INC.'S THIRD-PARTY PETITION BECAUSE IT STATED A CLAIM FOR CONTRIBUTION AND/OR INDEMNITY IN THAT THE MANITOWOC COMPANY, INC.'S CLAIMS SOUGHT CONTRIBUTION AND/OR INDEMNITY FOR ALL OR PART OF PLAINTIFFS' CLAIMS FOR PROPERTY DAMAGE AND TO ENFORCE SETTLEMENT AGREEMENT, AND IN THAT THE MANITOWOC COMPANY, INC. PROPERLY PLEADED THE CLAIM FOR CONTRIBUTION AND/OR INDEMNITY**

### A. Standard of review

A trial court's grant of a motion to dismiss is reviewed *de novo*. *City of Lake Saint Louis v. City of O'Fallon*, 324 S.W.3d 756, 759 (Mo.banc 2010). The Court reviews the petition "in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case." *Id.* A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. *Gill Construction, Inc. v. 18th & Vine Authority*, 157 S.W.3d 699, 707 (Mo.App. W.D. 2005), quoting *Reynolds v. Diamond Foods & Poultry, Inc.*, 79 S.W.3d 907, 909 (Mo. banc 2002). Appellant's averments are to be taken as true, and all reasonable inferences are liberally construed in favor of Appellant. *City of Lake Saint Louis*, 324 S.W.3d at 759.

Moreover, specifically at issue is the statutory interpretation of § 507.080, and Missouri Supreme Court Rule 52.11. "Statutory interpretation is an issue of law that this Court reviews de novo." *Spradling v. SSM Health Care St. Louis*, 313 S.W.3d 683, 686 (Mo.banc 2010). The Court is to discern the intent of the legislature from the plain and ordinary meaning of the language used and to give effect to that intent. *Id.*

**B. Section 507.080 and Rule 52.11 permit Appellant's third-party petition in that the claim for contribution and/or indemnity asserts that Respondent is or may be liable to Appellant for Plaintiffs' damage claims against Appellant.**

Respondent's Motion to Dismiss was based exclusively on a strained reading of §507.080 and Rule 52.11[2]. Respondent relied exclusively on the fact that it was not a party to the settlement agreement, and therefore "cannot be liable for Plaintiff's breach of contract claims against [Appellant] or for any sums that [Appellant] voluntarily agreed to pay to Plaintiff." LF 46. Respondent's argument ignores established law on the interpretation of these provisions, and as such, the granting of the motion to dismiss on this basis was in error.

Section 507.080 allows a defendant to "file a petition and serve a summons upon a

[2] In Respondent's Reply in Support of its Motion to Dismiss, Respondent first raised as an additional argument in support of dismissal that Appellant had failed to plead its own fault.

person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claims against him." RSMo. 507.080 (2010). Moreover, Rule 52.11 similarly states "a defending party, as a third-party plaintiff, may cause a summons and petition to be served upon a person not a party to the action who is or may be liable to the defending party for all or part of the plaintiff's claim against the defending party." Mo. R. Civ. P. 52.11(a).

The language of § 507.080 and Rule 52.11 is broad and specifically states that the third-party defendant is someone who is or may be liable. Missouri Courts have interpreted these provisions broadly. In *State ex rel. Perkins Coie, LLP v. Messina*, 138 S.W.3d 815, 817 (Mo.App. 2004), the Court explained that Rule 52.11 is "designed to further the efficient use of judicial resources by allowing a party who claims a right of *indemnity* against a third party to bring that third party directly into the pending action." (emphasis added). Similarly, in *Hipp v. Kansas City Public Service Company*, 237 S.W.2d 928, 930 (Mo.App. 1951), the Court explained that § 507.080 "should be liberally construed, to the end that the technical and useless be abandoned and the disposition of litigation on its merits be facilitated." The *Hipp* Court also indicated that the purpose of the statute was "to avoid two actions which should be tried together to save the time and cost of a reduplication of evidence, and to obtain consistent results from identical or similar evidence." *Id.*

In *State ex rel. Green v. Kimberlin*, 517 S.W.2d 124 (Mo.banc 1974), the Court reviewed whether the third-party claim was within the jurisdiction of third-party practice

under Rule 52.11. Green set forth an argument very similar to that of Respondent in the present matter, i.e., that the language of Rule 52.11 limits adjudicable claims to those arising out of the same transaction and being based upon the same theory of recovery as the original plaintiff's claims. *Id.* at 127 (emphasis added). The Court determined that such a reading of Rule 52.11 "is supported neither by [Rule 52.11's] language nor by authority." *Id.* Rather, it is necessary that the claim asserted in the third-party petition, if proven, "would transfer the liability asserted against the defendant/third-party plaintiff to the third-party defendant. There must be an attempt to *pass on to the third party all or part of the liability asserted against the Defendant*." *Id.* (emphasis added).

It is not necessary for Appellant, as third-party plaintiff, to assert the same theories as plaintiff. Rather, Appellant must only assert theories that would shift liability for all or part of Plaintiffs' claims to Respondent. Appellant has clearly set forth just such allegations, asserting that Respondent is liable for contribution and/or indemnity for amounts Appellant may be responsible for paying to Plaintiffs. Plaintiffs filed suit based upon property damage sustained on or about January 9, 2006, when the boom of a crane suddenly and unexpectedly fell because the "main hoist lift cylinder had split laterally in the housing area, which caused a loss of pressure." LF 8. Plaintiffs specifically alleged:

> 5. On or about January 9, 2006, the boom on a 1998 Grove Crane suddenly and unexpectedly fell down and landed on a building that was being constructed by BSI Constructors, Inc. (hereinafter referred to as "BSI") at Washington University in St. Louis County, Missouri.

6. An investigation determined the boom fell because the main hoist lift cylinder had split laterally in the housing area, which caused a loss of pressure.

7. Jacobsmeyer-Mauldin owned the crane at the time of said occurrence.

8. Grove designed, manufactured and/or sold that crane.

9. As a direct result of said occurrence, the crane was significantly damaged as was the building being constructed.

LF 8-9.

Appellant maintains that the hydraulic cylinder and/or the materials which form the hydraulic cylinder were provided by Respondent. LF 8-9. Appellant seeks from Respondent contribution and/or indemnity for the specific negligence caused by Respondent which resulted in property damage to Plaintiffs. In other words, Appellant seeks to "pass on to [Respondent] all or part of the [property damage] liability asserted against the [Appellant]." *Kimberlin*, 517 S.W.2d at 127.

Contribution provides a remedy to rectify unjust enrichment. It requires that the "contribution defendant must be liable to the *same person* for the *same injury*." *McNeill Trucking Co., Inc. v. Missouri State Highway and Transp. Com'n*, 35 S.W.3d 846, 847 (Mo.banc 2001). Respondent's liability is wholly dependent upon the liability of Appellant. Plaintiffs' claims and the resulting settlement agreement were based upon Respondent's negligence and the resulting damage. Appellant's liability is similarly

based upon the property damage sustained on or about January 9, 2006. Respondent is the company (or successor company) that designed, fabricated, built, or otherwise provided the cylinder specifically blamed by Plaintiffs for the failure and damage in this case. Therefore, Appellant's liability to Plaintiffs is based upon *the property damage sustained on or about January 9, 2006.* The settlement, which is the basis of the breach of contract claim, is based upon *the property damage sustained on or about January 9, 2006.* The contribution and/or indemnity claims against Respondent, if proven, would transfer the liability of Appellant to Respondent for the amounts paid to Plaintiffs for *the property damage sustained on or about January 9, 2006.* Appellant's claim for contribution and/or indemnity was properly pled as a third-party petition.

In *Kimberlin*, 517 S.W.2d 124, the Court, in analyzing the propriety of asserting a third-party claim under Rule 52.11, also reviewed whether the third-party petition could proceed regardless of the determination as between plaintiff and defendant. "If the liability of the third-party defendant is not dependent on the liability of the third-party plaintiff [to plaintiff], the claim would not come within the provisions of Rule 52.11." *Id.* at 127. In other words, if Appellant were to win against Plaintiffs, would Appellant still be able to assert its third-party claims against Respondent. In this case, the answer is clearly "no."

If Appellant were to succeed in defending against Plaintiffs' First Amended Petition for Property Damage and to Enforce Settlement, this would determine that Appellant was ***not*** liable to Plaintiffs for the damages. If Appellant has no liability to

Plaintiffs, there is no basis for the third-party claims against Respondent for contribution and/or indemnity. In contrast, if Appellant was unsuccessful in defending against Plaintiffs' claims for property damage and to enforce settlement, Appellant would be deemed liable for the damages incurred and, therefore, entitled to contribution and/or indemnity for the amounts paid to Plaintiffs. Under the test articulated in *Kimberlin*, Appellant's claims were properly asserted in the third-party petition.

The third-party petition falls squarely within the jurisdiction of third-party practice under § 507.080 and Rule 52.11. The allegations made against Respondent seek to transfer liability for all or part of the damages claimed by Plaintiffs. Respondent is liable to Plaintiffs for the same injury. *See generally McNeill Trucking Co., Inc. v. Missouri State Highway & Transp. Com'n*, 35 S.W.3d 846, 847 (Mo.banc 2001). Further, Appellant's claims for contribution and/or indemnity arise out of the exact same occurrence that gave rise to the litigation against Appellant. Appellant's claims for contribution and/or indemnity would transfer the liability of Appellant to Respondent for the amounts paid to Plaintiffs for *the property damage sustained on or about January 9, 2006*. To split this cause of action and require Appellant to bring a lawsuit against Respondent in yet another case has the exact opposite result of the purposes expounded in *Hipp* and *Messina*, i.e., to avoid two actions and to further efficient use of judicial resources. As a result, Appellant's third-party petition against Respondent sufficiently pleaded a cause of action, and dismissal was in error.

**C. Appellant has sufficiently pleaded a cause of action for contribution and/or indemnity in that Appellant has pled some inference or reasonable intendment of its own liability; therefore, dismissal on the basis of Appellant's failure to plead its own fault was in error.**

Over seven months after the filing of Respondent's Motion to Dismiss and the filing of Appellant's Suggestions in Opposition, Respondent presented for the very first time a new argument in support of dismissal in its Reply in Support of its Motion to Dismiss, i.e., that Appellant had failed to plead its own fault. This untimely argument is part of Respondent's continued effort to deny Appellant its day in Court and to take away Appellant's right to contribution and/or indemnity. However, Appellant has sufficiently pleaded its own fault. "[A] petition will be found sufficient if the allegations of the petition, accorded a reasonable and fair intendment, state a claim which can call for the invocation of principles of substantive law which may entitle the pleader to relief." *Major v. Frontenac Industries, Inc.*, 899 S.W.2d 895, 899 (Mo.App. 1995).

Missouri is a fact pleading state. *See generally* Mo. S. Ct. Rule 55.05. In order to state a claim for contribution, "the pleading must allege the factual elements a pleader must prove to prevail." *Stephenson v. McClure*, 606 S.W.2d 208, 213 (Mo.App. 1980). "It is a well-recognized rule that one seeking contribution as a joint tortfeasor must allege that he was a joint tortfeasor." *Id.* Specifically, the pleader must assert an "inference or reasonable intendment" that Appellant is or may be liable to Plaintiffs. *See id.*; *Major*, 800 S.W.2d at 900; *Mid-Continent News Co. v. Ford Motor Co.*, 671 S.W.2d 796, 800

(Mo.App. 1984).

In *Stephenson*, mere conclusionary statements without any inference or reasonable intendment of liability were asserted. The appellant made general reference to the accident at issue, and then alleged facts regarding the settlement negotiations. 606 S.W.2d at 210. Appellant then alleged the *respondent* was negligent in 11 respects, and that the plaintiff's injuries were the "direct and proximate result of the negligence of [respondent]." *Id.* Appellant concluded that it was entitled to contribution

> for all or such part, portion or percentage of the amount paid to Kimberly Stephenson as corresponded to the part, portion or percentage of fault for the collision in question as the jury may determine to have resulted from the act or omission by Fred T. Killian.

*Id.* at 210. The Court stated:

> The nearest approach to such an inference or intendment is the conlusionary statement and prayer that the appellant was entitled to contribution for all or part of the amount paid in settlement.

*Id.* The appellant in *Stephenson* did not assert any facts from which the court was able to infer liability. Therefore, the *Stephenson* court dismissed the claim for contribution.

In *Major v. Frontenac Industries, Inc.*, 899 S.W.2d 895 (Mo.App. 1995), the court held that Frontenac's petition alleged "more than just conclusory statements." Contrary to *Stephenson*, Frontenac specifically pled that it sold or leased the high horse to plaintiff's employer, and that the high horse was defective. *Id.* at 899. Frontenac also

*specifically* ***denied*** *its own liability to Plaintiff*, stating that it neither knew nor had reason to know that the high horse was defective. *Id.* The court found that Frontenac's petition "avers more than just conclusory statements" as in *Stephenson*, and sufficiently alleged liability to plaintiffs. *Id.* Therefore, the Court denied dismissal. *Id.* at 900.

Appellant's allegations create, at the least, an "inference or reasonable intendment" that Appellant was liable to Plaintiffs. *Stephenson*, 606 S.W.2d at 213; *Frontenac*, 899 S.W.2d at 899. Appellant alleged more than the mere conclusionary statement at issue in *Stephenson*. *Id.* Rather, Appellant specifically pleaded that it manufactured the crane at issue, placed a defective steel cylinder on the crane, and that said crane was defective, causing the alleged injuries to Plaintiffs. LF 36-37, ¶¶ 1-2, 8-9. Appellant's numerous allegations establish that the crane was owned by Appellant, that the crane fell, and that the crane fell due to some defect, thereby creating an "inference or reasonable intendment" that Appellant is or may be liable to Plaintiffs for all or part of the damages asserted, i.e., that Appellant is or may be a joint tortfeasor.

Appellant's claim for contribution and/or indemnity based upon the property damage allegedly sustained by Plaintiffs was not a "new argument" raised at the March 18, 2011, hearing, as stated by Respondent. LF 73, see also LF 56-57 ("to the extent Manitowoc now argues that its claim for contribution/indemnity, while not pleaded as such, is actually based on Manitowoc paying settlement amounts to third-parties in connection with an incident occurring on January 9, 2006…"). Rather, Appellant's claim for contribution and/or indemnity consistently has been based upon the specific

negligence caused by Respondent which resulted in property damage to Plaintiffs. See LF 36 ("The Petition…involves claims by Plaintiffs…based on allegations of breach of settlement contract and negligence arising from an accident that occurred on or about January 9, 2006, when employees and agents of [Plaintiffs] were operating a crane manufactured by [Appellant] in St. Louis, Missouri, when the boom of said crane struck a building that was adjacent to the crane"); LF 42 ("Plaintiffs' action is related to a single occurrence, during which a crane fell onto a building which was in the process of being constructed, causing damage to both the building and the crane. The third-party claims are related to the *same single occurrence and any alleged damages associated with said occurrence.*")(emphasis added). In fact, Appellant specifically argued in its Response to Respondent's Motion to Dismiss that the claim for contribution was as a joint tortfeasor. LF 51. Appellant argued:

> Plaintiffs' Petition cites a failure of the main hoist lift cylinder as an allegation in its Petition. This is the same allegation made by Manitowoc against United in its Third Party Petition. While the original Petition also alleges settlement agreements and breaches of those agreements, that does not change the fact that it also alleges product liability tort failure of the machine itself.

LF 51. Further, Appellant argued: "[c]ertainly, United as the original designer, provider or manufacturer of the cylinder could have been named by Plaintiffs in this suit as a Co-Defendant responsible for the negligent failure of the cylinder." LF 51. It was

Respondent who failed to raise an argument regarding the alleged failure to plead its own fault until the Reply filed after the hearing on March 18, 2011. Respondent's initial Motion to Dismiss is void of any argument in this regard. See LF 45-48.

In order for Respondent's argument to prevail, an overly restrictive reading of the pleadings is necessary. Such a narrow and one-sided reading is against the weight of authority on the matter and vastly inappropriate. Respondent's analysis would require the court to ignore relevant provisions in the third-party petition, and look only to the denials set forth in paragraphs 18 and 22 of the third-party petition. Respondent cannot assert dismissal is necessary where there is *any* denial of liability. *See Major*, 899 S.W.2d at 899 (Frontenac specifically denied its liability). Respondent's assertion can only pass muster by ignoring the inferences of liability asserted. This court must review the petition as a whole and not simply review those provisions in support of Respondent's theory. *See City of Lake Saint Louis v. City of O'Fallon*, 324 S.W.3d 756, 759 (Mo.banc 2010)(Appellant's averments are taken as true, and all reasonable inferences are construed in favor of Appellant).

Moreover, Missouri law has fundamentally allowed inconsistent positions to be alternatively taken in pleadings. Specifically, Rule 55.10 states:

> A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the

> pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or equitable grounds.

Mo. R. Civ. P. 55.10. This Rule does not *exclude* parties asserting claims for *contribution* from pleading in the alternative. To deny Appellant the right to expressly deny its liability has the effect of denying *only* contribution plaintiffs of the explicit right created under Rule 55.10.

While Appellant denied liability at paragraphs 18 and 22 of its third-party petition, Appellant also, alternatively, pleaded its own fault sufficiently to state a cause of action for contribution. More than mere conclusionary allegations were set forth in Appellant's third-party petition. Taking Appellant's averments as true, and with all reasonable inferences liberally construed in favor of Appellant, it is clear that Appellant has sufficiently pleaded a cause of action for contribution and/or indemnity.

In *Major v. Frontenac Industries, Inc.*, 899 S.W.2d 895 (Mo.App.E.D. 1995), Frontenac specifically denied its own liability, stating that it "neither knew nor had reason to know that the high horse was defective," and plead, *alternatively*, that "in the event it was found liable," Frontenac was entitled to contribution or indemnity from Churchman. The court found such allegations sufficient, concluding that "Frontenac does allege its liability to plaintiff." *Id.* Appellant similarly set forth specific factual allegations establishing that it is or may be liable to Plaintiff (see L.F. 36-37), specifically

denied its own liability, *and* pleaded *alternatively* that "in the event it was found liable," it is entitled to contribution or indemnity from Respondent.

In a nearly identical situation, the Supreme Court of North Carolina found that pleading in the alternative was sufficient to state a claim for contribution. *See Clemmons v. King*, 265 N.C. 199, 143 S.E.2d 83 (1965). The court first set forth North Carolina requirements for stating a claim for contribution, which, as in Missouri, require a pleader to "allege ***facts sufficient to show joint tortfeasorship*** and his right to contribution in the event plaintiff recovers against him." *Id.* at 202 (emphasis added). To establish "joint tortfeasorship," the pleader is required to allege facts "sufficient to make the third party liable to the plaintiff along with the cross-complaining defendant in the event of a recovery by the plaintiff against him." *Id.*

The court then discussed pleading in the alternative, and stated that the contribution pleader is not required "to make a judicial admission that his negligence was one of the proximate causes of the injury for which plaintiff sues." *Id.* Rather, the pleader "may deny negligence and allege, conditionally or alternatively, that *if* he was negligent, the third party's negligence concurred with his as a proximate cause of plaintiff's injuries." *Id.*

Appellant is only required to raise an "inference or reasonable intendment" of Appellant's liability to Plaintiffs. As in *Major*, and contrary to *Stephenson* and *Mid-Continent*, Appellant specifically set forth facts establishing that Appellant is or may be liable to Plaintiffs. Appellants pleaded the facts necessary to state a claim for

contribution under Missouri law, i.e., Appellant alleged it manufactured the crane at issue, that the crane it manufactured was defective because it included as part of the crane the defective cylinder part, and that this same crane was the cause of Plaintiffs' alleged injuries. In order for Respondent's argument to prevail, the court must ignore relevant provisions in the third-party petition, alleging inferences and reasonable intendment of liability, and look only to the *alternatively* pled denials. In reviewing the third-party petition as a whole, taking Appellant's averments as true, and construing all inferences in favor of Appellant, Appellant met the pleading requirements for contribution and/or indemnity. Therefore, the dismissal with prejudice of Appellant's third-party petition was in error.

## II. THE TRIAL COURT ERRED IN DISMISSING THE MANITOWOC COMPANY, INC.'S THIRD-PARTY PETITION WITH PREJUDICE BECAUSE THE APPROPRIATE DISPOSITION IS TO STRIKE THE THIRD-PARTY PETITION OR TO DISMISS WITHOUT PREJUDICE IN THAT "DISMISSAL" OF A THIRD-PARTY PETITION UNDER RULE 52.11 OR § 507.080 IS BASED UPON A LACK OF JURISDICTION AND, THEREFORE, IS NOT A DETERMINATION OF THE MERITS OF THE CASE

### A. Standard of review

The trial court erred when it dismissed the third-party petition by exceeding its authority and improperly dismissing the petition *with* prejudice. Therefore, the review

should be *de novo* in that it is a question of law whether the trial court had authority to dispose of a third-party petition by dismissal with prejudice. *See generally In re Smythe*, 254 S.W.3d 895, 897 (Mo.App. 2008)("since this appeal involves the question of whether the trial court had authority to amend the judgment in the way that it did, this is a question of law, which we review *de novo.*")

Moreover, under Rule 84.14, this Court has jurisdiction to "give such judgment as the court ought to give." This includes clarifying an order dismissing with prejudice a third-party petition to, instead, ordering the third-party petition stricken. *Wedemeier v. Gregory*, 872 S.W.2d 625, 627 (Mo.App. 1994).

**B. The proper disposition where a court lacks jurisdiction under Rule 52.11 or § 507.080 is to strike the third-party petition or to dismiss without prejudice, and dismissal with prejudice was in error**

While Appellant maintains that dismissal was inappropriate, should this Court find that the third-party petition was improperly pleaded as such, the sanction is not dismissal *with* prejudice. Rather, the proper disposition is to strike the third-party petition, or to dismiss the case *without* prejudice. The "dismissal" of a third-party petition under Rule 52.11 or § 507.080 is based upon a lack of jurisdiction, and therefore is not a determination of the merits of the case. *See generally State ex rel. Perkins Coie LLP v. Messina*, 138 S.W.3d 815 (Mo.App. 2004)(where Rule 52.11 precludes joinder of third-party claims, the court lacks jurisdiction over the third-party petition). As such, dismissal with prejudice is improper.

In *AAA Excavating, Inc. v. Francis Const., Inc.*, 678 S.W.2d 889 (Mo.App. 1984), the court reviewed the third-party petition following a motion to dismiss for failure to state a claim. The court stated "a petition is not to be dismissed for failure to state a claim for relief unless it appears that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 893-94. "Even if imperfectly or defectively stated, if the pleader's allegations invoke substantive principles of law which may entitle him to relief, a motion to dismiss for failure to state a claim for relief should be denied." *Id.* at 894.

After determining that the third-party petition met the general pleading requirements to survive a motion to dismiss, the court reviewed whether it met the specific requirements for third-party petitions under Rule 52.11. *Id.* The court reiterated the test previously set forth, i.e., "if a third party plaintiff could proceed and recover against the third party defendant even if the third party plaintiff were to win in the suit brought by the plaintiff the petition would not be covered by Rule 52.11." *Id.* In finding that the petition was not a proper third-party petition under Rule 52.11, the Court stated that dismissal of the third-party petition was improper, as it met the general pleading requirements for a petition. Rather, the proper remedy where a petition states a cause of action but is not the proper subject for a third-party petition is to strike the pleading, ***not*** dismissal. *Id.* (emphasis added); *see also Wedemeier v. Gregory*, 872 S.W.2d 625, 627 (Mo.App. 1994) (clarifying the trial court's order and striking the third-party petition which stated a cause of action but was not the proper subject of a third-party petition).

Similarly, in *State ex rel. Ashcroft v. Gibbar*, 575 S.W.2d 924 (Mo.App. 1978), the Court reviewed the language of Rule 52.11 to determine whether dismissal with prejudice was appropriate. Rule 52.11 provides "[a]ny party may move to strike the third-party claim, or for its severance or separate trial." In reviewing this language, the Court stated "[t]he word 'strike' is a carefully chosen word. Within the context of Rule 52.11 it means to delete, that is, 'to eliminate as a factor or matter for consideration.'" *Id.* at 929. The Court further stated that striking the third-party petition is the proper remedy where the petition states a cause of action, but was not a proper subject for a third-party petition. *Id.*

Contribution is based upon the "principle of fairness," permitting a party to seek, in essence, an equitable reimbursement for amounts that party has already or may be required to pay to the injured party, including finding the contribution defendant liable for the entire amount of damage. *See generally Mo. Pac. R.R. v. Whitehead & Kales Co.*, 566 S.W.2d 466 (Mo. 1978) (discussing fairness and equitable aspects of contribution claim). Respondent can cite to no authority supporting the conclusion that all rights to contribution must be foreclosed based upon an allegedly improperly pleaded third-party petition. In fact, none of the cases relied upon by Respondent dismissed the claims *with* prejudice. *See Stephenson v. McClure*, 606 S.W.2d 208 (Mo.App. 1980); *Mo. Pac. R.R. v. Whitehead & Kales Co.*, 566 S.W.2d 466 (Mo. 1978); *Mid-Continent News Co. v. Ford Motor Co.*, 671 S.W.2d 796 (Mo.App. 1984). The petition itself meets the pleading requirements for a cause of action for contribution and/or indemnity. To deny Appellant the right to contribution and/or indemnity would create an unfair burden on Appellant,

and improperly deny Appellant its day in court and a determination on the merits of the contribution and/or indemnity claims.

While Appellant maintains that it should be permitted to maintain the third-party petition in the same cause of action, if the Court believes that the third-party petition is not properly asserted as such, the proper remedy is not dismissal ***with*** prejudice. Rather, the third-party petition should have been stricken. Appellant has clearly stated a cause of action for contribution and/or indemnity. *See* Section I above; *see also generally Safeway Stores, Inc. v. City of Raytown*, 63 S.W.2d 727, 731 (Mo.banc 1982)("The principle of fairness recognized in Whitehead & Kales and the logical relation between it and Rule 52.11 mandate recognition of a separate cause of action.").

Moreover, even if the petition is to remain "dismissed," the dismissal should be modified to a dismissal *without* prejudice. Respondent can cite to no authority stating that where there is a dismissal based upon a lack of jurisdiction, that the case should be dismissed *with* prejudice.

In contrast, where a jurisdictional issue exists, the proper result is *not* dismissal with prejudice. This premise is true in a variety of jurisdictional contexts. For example, in the context of personal jurisdiction, the court has held that a cause of action should be dismissed ***without*** prejudice, as it was not an adjudication on the merits of the underlying cause of action. *Consolidated Elec. & Mechanicals, Inc. v. Schuerman*, 185 S.W.3d 773 (Mo.App. 2006). "If the Rule were otherwise, a plaintiff would lose his cause of action, be deprived of his day in court and of any consideration of the merits of his claim merely

by the reason of the selection of the improper forum." *Id.* at 777 (quoting *Hagen v. Rapid American Corp.*, 791 S.W.2d 452, 455 (Mo.App. 1990). Similarly, "[a] dismissal for lack of subject matter jurisdiction must be without prejudice because the court has no authority to decide the case on the merits." *Seldomridge v. General Mills Operations, Inc.*, 140 S.W.3d 58, 63-64 (Mo.App. 2004).

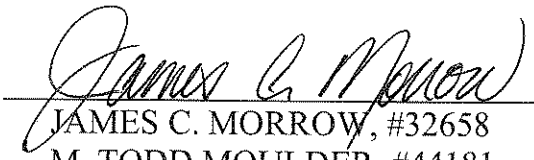
Dismissal with prejudice is a drastic and extremely harsh sanction. *Clayton v. White Hall School Dist.*, 778 F.2d 457 (8th Cir. 1985). In the context of a dismissal for failure to follow a court order, dismissal *with* prejudice is only warranted where there is a pattern of intentional delay or in cases of willful disobedience of a court order. *Id.* "To deny forever the appellant's day in court is unjustified where, as here, there is no evidence of a pattern of delay or contumacious conduct." *Id.* at 460. *Clayton* addresses dismissal following noncompliance with a court order, but is still instructive with regard to the fact that dismissal with prejudice is a harsh sanction, which in effect denies a party its day in court. The trial court's dismissal of this case *with* prejudice was error.

## CONCLUSION

This Court possesses jurisdiction to conduct a *de novo* review of the Circuit Court's dismissal of Appellant's third-party petition. The Circuit Court committed reversible error in dismissing the third-party petition because Appellant's claims for contribution and/or indemnity were within the jurisdiction of third-party practice, and Appellant appropriately pleaded a claim for contribution and/or indemnity in that Appellant sufficiently pleaded its own fault.

Additionally, the Circuit Court committed reversible error in dismissing the third-party petition *with* prejudice because the proper remedy in such a case is to strike the petition, or dismiss *without* prejudice. Therefore, Appellant respectfully requests this Court to reverse the Circuit Court's dismissal with prejudice and remand the case to the Circuit Court for continued proceedings. In the alternative, Appellant requests this Court to exercise its authority pursuant to Rule 84.14 and reverse the dismissal with prejudice and order the petition stricken, or affirm the dismissal and modify it to "without prejudice," in accordance with Missouri law.

MORROW WILLNAUER KLOSTERMAN
CHURCH, L.L.C.

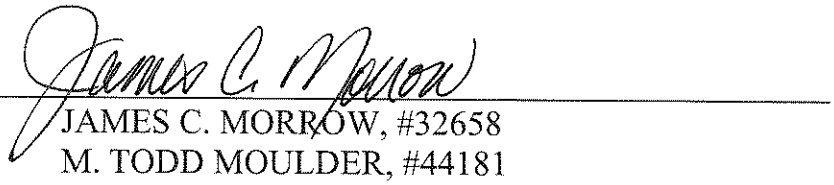
By 
JAMES C. MORROW, #32658
M. TODD MOULDER, #44181
ANGELA M. WITTEN, #60085
Executive Hills East, Building A
10401 Holmes, Suite 300
Kansas City, Missouri 64131-3405
Telephone: (816) 382-1382
Fax: (816) 382-1383
Email: jmorrow@mwklaw.com
tmoulder@mwklaw.com
awitten@mwklaw.com

ATTORNEYS FOR APPELLANT
THE MANITOWOC COMPANY, INC.

CERTIFICATE OF WORD PROCESSING PROGRAM

The undersigned hereby certifies that the Brief was prepared on a computer, using Microsoft Word. A diskette containing the full text of the Brief in Microsoft Word is provided herewith, and has been scanned for viruses and is believed to be virus-free.

MORROW WILLNAUER KLOSTERMAN CHURCH, L.L.C.



JAMES C. MORROW, #32658
M. TODD MOULDER, #44181
ANGELA M. WITTEN, #60085
Executive Hills East, Building A
10401 Holmes, Suite 300
Kansas City, Missouri 64131-3405
Telephone: (816) 382-1382
Fax: (816) 382-1383
Email: jmorrow@mwklaw.com
tmoulder@mwklaw.com
awitten@mwklaw.com

ATTORNEYS FOR APPELLANT
THE MANITOWOC COMPANY, INC.

CERTIFICATE OF COMPLIANCE 84.06(b)

The undersigned hereby certifies that the Brief herein is in compliance with Missouri Rule of Civil Procedure 84.06. According to the word count of the word processing system used to prepare the Brief, the Brief contains 7,431 words.

MORROW WILLNAUER KLOSTERMAN CHURCH, L.L.C.

JAMES C. MORROW, #32658
M. TODD MOULDER, #44181
ANGELA M. WITTEN, #60085
Executive Hills East, Building A
10401 Holmes, Suite 300
Kansas City, Missouri 64131-3405
Telephone: (816) 382-1382
Fax: (816) 382-1383
Email: jmorrow@mwklaw.com
tmoulder@mwklaw.com
awitten@mwklaw.com

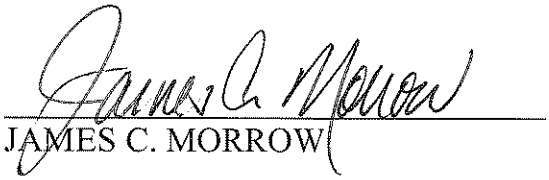
ATTORNEYS FOR APPELLANT
THE MANITOWOC COMPANY, INC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served via electronic filing, and mailed in electronic format via a CD containing same in PDF and WORD format, on the 21st day of June 2012, via first class U.S. Mail, postage prepaid, to the following:

Stephen L. Beimdiek
Sarah Hugg
LASHLY BAER PC
714 Locust Street
St. Louis, Missouri 63101-1603

ATTORNEYS FOR RESPONDENT
UNITED STATES STEEL CORPORATION



JAMES C. MORROW